IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE CLARK CONSTRUCTION GROUP INC.	:	
v.	:	Civil Action No. DKC 2002-1590
ALLGLASS SYSTEMS, INC., et al.	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this breach of contract case is the joint motion by Defendants Allglass Systems, Inc. ("Allglass") and Colonial Surety Company ("Colonial") to authorize an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) of the court's January 13, 2005 Order denying their motion for reconsideration. The issues have been fully briefed and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the reasons that follow, the court will deny the motion.

I. Background

This case arises out of circumstances surrounding two construction projects: (1) an office building in Washington, DC (1201 Eye Street Project) and (2) the Chevy Chase Bank headquarters building in Bethesda, Maryland (Chevy Chase Bank Project). On these projects, Plaintiff, The Clark Construction Group, Inc. ("Clark") was the general contractor, Allglass was

a subcontractor, and Colonial was Allglass' surety. On the 1201 Eye Street Project, Third-Party Defendant Kawneer Company, Inc. ("Kawneer") designed and manufactured the window systems installed by Allglass.[1]

After discovery had closed and multiple dispostive motions were filed, on August 6, 2004, this court granted Clark's motion for partial summary judgment and Kawneer's motion for summary judgment, and denied the cross-motions for summary judgment filed by Allglass and Colonial. As a result, judgment was entered in favor of Clark and against Allglass and Colonial as to liability, and in favor of Kawneer and against Allglass on the third-party claims. *See* Paper 139 (Order). Defendants Allglass and Colonial thereafter moved for reconsideration of the August 6 Order, which the court denied. Defendants now move for authorization to file an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b).[2] For the following reasons, Defendants' motion will be denied.

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[1] For a complete recount of the factual history of this case, see the court's prior Memorandum Opinion. Paper 138.

[2] Although Defendants' motion is titled as a Joint Motion to Alter or Amend Order Denying Joint Motion for Reconsideration, the arguments set forth in their papers make clear it is actually a request that the court authorize an interlocutory appeal of its August 6, 2004 Order, in which the court granted Clark's and Kawneer's respective motions for summary judgment and denied the summary judgment motions of Defendants.

II. Analysis

"Section 1292(b) provides a mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court of appeals." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1025–26 (9th Cir. 1982), *aff'd for lack of forum sub non.*, *Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983); *see also Costar Group Inc. v. LoopNet, Inc.*, 172 F.Supp.2d 747, 750 (D.Md. 2001). That section states in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). Thus, a defendant seeking an interlocutory appeal pursuant to § 1292(b) must "show (1) that a controlling issue of law exists (2) about which there is a substantial basis for difference of opinion and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Riley v. Dow Corning Corp.*, 876 F.Supp. 728, 731 (M.D.N.C. 1992). Unless all of the statutory criteria are satisfied, "a district court may not and should not certify its

order . . . for an immediate appeal under [§] 1292(b)." *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000); *see also Riley,* 876 F.Supp. at 731 (stating that § 1292(b) "requires strict adherence to all statutory requirements before certification will be allowed"). Moreover, the Fourth Circuit has cautioned that "§ 1292(b) should be used sparingly and . . . that its requirements must be strictly construed." *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989); *see also Riley*, 876 F.Supp. at 731 ("The legislative history of [§ 1292(b)] suggests that there is a strong federal policy against piecemeal appeals."); *Beck v. Communications Workers of America*, 468 F.Supp. 93, 95–96 (D.Md. 1979) ("Section 1292(b), a narrow exception to the longstanding rule against piecemeal appeals, is limited to exceptional cases.").

In their motion, Defendants Allglass and Colonial argue that "the controlling question of law is whether summary judgment was properly granted based on the law." Paper 152 at 3. Specifically, they contend that "whether notice of default, which is a condition precedent to Allglass' and [Colonial's] liability, was properly provided by Clark to Allglass is a controlling question of law that has a significant bearing on Allglass's liability under the subcontract," and, moreover, that "[t]he issue of notice is a factual issue that Allglass and

Colonial contend was improperly decided on summary judgment." *Id*. at 4. They also point to several findings made by the court in its August 6, 2004 Opinion, asserting that "[t]here are substantial grounds for a difference of opinion as to each of these material facts," and arguing that "a ruling by the Court that even one of these material facts is in dispute would likely warrant a different outcome on summary judgment." *Id*. at 5.

Although Defendants may be correct about the consequences should a court find a material fact in dispute, they have failed to demonstrate that any of the issues they point to are controlling questions of law as to which there are substantial grounds for a difference of opinion. First, Defendants plainly seek a review of whether any of the material facts the court found as undisputed were, in fact, disputed. *See id.* at 5 ("There are substantial grounds for a difference of opinion as to each of these material facts."). However, "[t]he antithesis of a proper § 1292(b) appeal is one that turns on whether there is a genuine issue of fact or whether the district properly applied settled law to the facts or evidence of a particular case." *McFarlin v. Conseco Services, LLC*, 381 F.3d 1251, 1259 (11th Cir. 2004); *see also Marlbrough v. Crown Equip. Corp.*, 392 F.3d 135, 136 (5th Cir. 2004) ("The underlying issue of whether [a party] has presented sufficient evidence to show a 'genuine

issue . . . [of] material fact,' and thus avoid summary judgment under Fed.R.Civ.P. 56(c), is not a question of law within the meaning of § 1292(b).”). In *Ahrenholz*, 219 F.3d at 676, the Seventh Circuit focused in some detail on the type of questions appropriate for § 1292(b) appeal:

> Formally, an appeal from the grant or denial of summary judgment presents a question of law (namely whether the opponent of the motion has raised a genuine issue of material fact), which if dispositive is controlling; and often there is room for a difference of opinion. So it might seem that the statutory criteria for an immediate appeal would be satisfied in every case in which summary judgment was denied on a nonobvious ground. But that cannot be right. . . .
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> We think “question of law” as used in section 1292(b) has reference to a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than to whether the party opposing summary judgment had raised a genuine issue of material fact. . . . We also think, here recurring to our recent order denying permission to take a section 1292(b) appeal in *Downey v. State Farm Fire & Casualty Co.*, No. 00-8009 (7th Cir. May 18, 2000), that the question of the meaning of a contract, though technically a question of law when there is no other evidence but the written contract itself, is not what the framers of section 1292(b) had in mind either. We think they used “question of law” in much the same way a lay person might, as referring to a “pure” question of law rather than merely to an issue that might be free from a factual contest. The idea was that if a case turned

> on a pure question of law, something the court of appeals could decide quickly and cleanly without having to study the record, the court should be enabled to do so without having to wait till the end of the case. . . . But to decide whether summary judgment was properly granted requires hunting through the record compiled in the summary judgment proceeding to see whether there may be a genuine issue of material fact lurking there; and to decide a question of contract interpretation may require immersion in what may be a long, detailed, and obscure contract . . . .

Id. at 676–77 (internal footnotes omitted); *see also McFarlin*, 381 F.3d at 1259 ("To summarize, § 1292(b) appeals were intended, and should be reserved, for situations in which the court of appeals can rule on a pure question of law without having to delve beyond the surface of the record in order to determine the facts.").

Given Defendants' assertion that the "controlling issue of law is whether summary judgment was properly granted based on the law," and that "[t]here are substantial grounds for a difference of opinion as to . . . material facts" identified in their moving papers, Defendants have not demonstrated that there are controlling questions of pure law about which there is a substantial basis for difference of opinion. Rather, they point to "factual issue[s] that Allglass and Colonial contend [were] improperly decided on summary judgment." Paper 152 at 4. As

the authorities cited above make clear, such questions are not proper for § 1292(b) appeal.[3]

Moreover, even if there were controlling questions of law involved, Defendants have failed to demonstrate that there is a "substantial ground for difference of opinion" on those questions. In their motion, Defendants do not cite a single authority to support their sweeping assertion that "the Court's ruling on Clark's Motion for Partial Summary Judgment . . . provides substantial grounds for difference of opinions," nor to support their general claim that "[t]here are substantial grounds for a difference of opinion as to each of [the] material facts" identified in their motion. *See* Paper 152 at 4–5. In their reply, however, Defendants contend "the relevant authorities cited in the Joint Motion [for Reconsideration]" demonstrate that "there are clearly substantial grounds for a difference of opinion." Paper 163 at 7. However, the cases Defendants cited in their Joint Motion for Reconsideration were considered by the court in ruling on that motion and found to be distinguishable, inapposite, and not controlling on the issues

[3] Although Defendants attempt in their reply memorandum to recharacterize the issues as "controlling questions of law," the issues nonetheless remain inextricably rooted in the facts of the case and, as evidenced by the court's August 6, 2004 opinion, could not be decided without "delv[ing] beyond the surface of the record." *McFarlin*, 381 F.3d at 1259.

presented in this case. Accordingly, these "relevant authorities" do not demonstrate a substantial ground for difference of opinions on any controlling questions of law. In fact, Defendants' Joint Motion for Reconsideration, like the present motion, relied less on identifying perceived legal errors, or errors in the application of law to facts, and more on identifying what they contended were material issues of fact in dispute. *Compare* Paper 141 at 5 (asserting that the court "overlooked material and determinative facts that favor Allglass and Colonial," that, "when viewed in the light most favorable to the non-moving party," present genuine issues of material fact in dispute), *with* Paper 152 at 5 ("[A] ruling by the Court that even one of these material facts is in dispute would likely warrant a different outcome on summary judgment."). In short, neither Defendants' oppositions to Clark's and Kawneer's respective motions for summary judgment, the Joint Motion for Reconsideration, nor the present motion demonstrate a substantial ground for difference of opinion on any of the legal issues previously decided by this court.

Finally, even if Defendants had demonstrated the existence of the first two requirements for certifying an appeal pursuant to § 1292(b), it is doubtful that allowing Defendants to appeal the issue of liability while the issue of damages remains would

"materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Generally, this requirement is met when resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation. *See generally* 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3930, at 432 (2nd ed. 1996). *See also Orson, Inc. v. Miramax Film Corp.*, 867 F.Supp. 319, 322 (E.D.Pa. 1994) ("In determining whether certification will materially advance the ultimate termination of the litigation, a district court is to examine whether an immediate appeal would (1) eliminate the need for trial, (2) eliminate complex issues so as to simplify the trial, or (3) eliminate issues to make discovery easier and less costly.").

In *Winstead v. United States*, 863 F.Supp. 264, 269 (M.D.N.C. 1994), the district court denied the plaintiffs' request for § 1292(b) certification of the court's summary judgment order on the grounds that an appeal would not materially advance the ultimate termination of the litigation. The court's reasoning is instructive:

> This action is presently only partially resolved. While the issue of liability has been decided, the issue of damages remains. Certifying this incomplete action for appeal would be wasteful. By waiting for the issue of damages to be resolved, the entire action can be reviewed on appeal. Certifying the

> action for review before damages have been determined would likely result in one appeal on the liability issue and a separate appeal on the damages issue. Creating a situation necessitating two separate appeals is a waste of judicial resources and should be avoided if possible.

Id. at 269. Similarly, here the question of liability has been decided, but the issue of damages remain. Given "the court's general policy against piecemeal appeals in the course of ongoing litigation," and the fact that a favorable ruling for Defendants on appeal would not eliminate the need for a trial, or for that matter, simplify the trial, Defendants simply have not demonstrated that an appeal at this time would materially advance the ultimate termination of the litigation. *See CoStar*, 172 F.Supp.2d at 750 ("[T]he court's general policy against piecemeal appeals in the course of ongoing litigation, especially where even a resolution in [the plaintiff's] favor on appeal would not prevent a trial as to other issues still outstanding, undermines [the] argument that sound trial management principles support an immediate interlocutory appeal."); *North Carolina ex rel. Howes v. W.R. Peele, Sr. Trust*, 889 F.Supp. 849, 856 (E.D.N.C. 1995) (recognizing that certifying an order for interlocutory appeal after the defendants had been found liable under CERCLA but before the trial on damages "would result in exactly the kind of piecemeal

review the Fourth Circuit has advised against and would manifestly delay the ultimate resolution of this litigation in its entirety").

III. Conclusion

For the foregoing reasons, Defendants' motion for authorization to pursue an interlocutory appeal under 28 U.S.C. § 1292(b) is denied. A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

March 30, 2005